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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOE LEE WILKERSON, JR., Defendant and Appellant.	A157996 (Contra Costa County Super. Ct. No. 05-142379-7)

Appellant Joe Lee Wilkerson, Jr. was charged with murder but pleaded no contest to voluntary manslaughter. He filed a petition for resentencing pursuant to Penal Code[1] section 1170.95, which provides for resentencing of individuals convicted of felony murder or murder under a natural and probable consequences theory if they can no longer be convicted of murder under January 1, 2019 amendments to the Penal Code. The superior court summarily denied his petition, concluding that his voluntary manslaughter conviction made him ineligible for relief under the statute. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2014, appellant, his brother Lester Williams, and Keunta Turner, along with several other people, stormed into a house in Richmond to

[1] Undesignated statutory references are to the Penal Code.

confront the homeowner and his wife over a physical altercation that had just occurred between the homeowner and Turner's father.[2] The homeowner retrieved a firearm and shot into the group, injuring Turner and killing Williams.

In July 2014, a complaint was filed charging appellant and Turner with Williams's murder (§ 187, subd. (a)) and first degree residential burglary (§§ 459, 460). A prior strike conviction (§§ 667, subds. (b)-(i), 1170.12) was alleged against appellant. After a preliminary hearing, appellant was held to answer as charged.

In 2015, pursuant to a negotiated agreement, an amended information was filed charging appellant and Turner with voluntary manslaughter (§ 192, subd. (a)) and first degree residential burglary (§§ 459, 460), and alleging appellant suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12). In exchange for a sentence of no more than eight years eight months, appellant pleaded no contest to the charges and admitted the strike allegation. The trial court sentenced appellant to state prison for eight years eight months.

In 2018, the Legislature enacted Senate Bill. No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), which took effect on January 1, 2019. (Stats. 2018, ch. 1015.) Among other changes, Senate Bill 1437 amended section 189 to limit liability for murder under a felony murder or natural and probable consequences theory to a person who is the actual killer, who "with the intent to kill" aids and abets the actual killer, or who is a major participant in the underlying felony and acted with reckless indifference to human life. (Stats. 2018, ch. 1015, §§ 1(f), 3(e); see § 189, subd. (e).) Senate Bill 1437 permits an individual convicted of murder under these theories to petition the sentencing

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[2] Our summary of the facts is taken from appellant's reply brief to the People's opposition to his section 1170.95 petition.

court to vacate the conviction and to be resentenced on any remaining counts under certain enumerated procedures. (Stats. 2018, ch. 1015, § 4; see § 1170.95.)

In January 2019, appellant petitioned for resentencing under section 1170.95. The superior court appointed counsel for him. The People filed an opposition to the petition, arguing that because he had been convicted of voluntary manslaughter and not murder, he failed to make a prima facie showing of entitlement to relief. Appellant filed a reply.

On July 17, 2019, the superior court summarily denied appellant's petition, concluding that section 1170.95 provides relief for murder convictions only. This appeal followed.

DISCUSSION

A. Senate Bill 1437 and Section 1170.95

"Effective January 1, 2019, Senate Bill 1437 amended murder liability under the felony-murder and natural and probable consequences theories. The bill redefined malice under section 188 to require that the principal acted with malice aforethought. Now, '[m]alice shall not be imputed to a person based solely on his or her participation in a crime.' (§ 188, subd. (a)(3).)" (*People v. Turner* (2020) 45 Cal.App.5th 428, 433 (*Turner*).) The bill also amended section 189 to provide that a defendant who was not the actual killer and did not have an intent to kill is not liable for felony murder unless he or she "was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e)(3).)

Senate Bill 1437 also enacted section 1170.95, which authorizes "[a] person convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the

petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts" so long as three conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subds. (a)(1)-(a)(3).) Any petition that fails to make "a prima facie showing that the petitioner falls within the provisions of [section 1170.95]" may be denied without a hearing. (§ 1170.95, subds. (c) & (d).)

B. Section 1170.95 Does Not Apply to Defendants Convicted of Voluntary Manslaughter.

Appellant claims that section 1170.95 applies to defendants who entered a plea to a lesser homicide offense in lieu of going to trial to defend against a murder predicated on a theory of imputed malice. He states that he was prosecuted under the provocative act doctrine,[3] a doctrine that he asserts has been abrogated by the 2019 amendments to sections 188 and 189. For purposes of this appeal, we will assume, without deciding, that appellant can

[3] "The provocative act doctrine does not define a crime. [Citation.] Rather, 'provocative act murder' is a descriptive term referring to a subset of intervening-act homicides in which the defendant's conduct provokes an intermediary's violent response that causes someone's death." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 649, fn. 2.)

establish he was charged with murder based on the provocative act doctrine and that he could no longer be convicted of that crime after Senate Bill 1437.[4]

Appellant's eligibility for relief under section 1170.95 is a question of law that we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *Turner, supra,* 45 Cal.App.5th at p. 435.) " ' "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." ' " (*People v. Scott* (2014) 58 Cal.4th 1415, 1421.) We first consider the statutory language, " ' "giving [it] a plain and commonsense meaning." ' " (*Ibid.*) " ' " 'When [that] language . . . is clear, we need go no further.' [Citation.] But where a statute's terms are unclear or ambiguous, we may 'look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' " ' " (*Ibid.*)

Section 1170.95 allows "[a] person *convicted of felony murder or murder under a natural and probable consequences theory*" to file a petition "to have the petitioner's *murder conviction* vacated." (§ 1170.95, subd. (a), italics added.) Should the superior court find that the petitioner has made a prima facie showing of entitlement to relief and issue an order to show cause, it "shall hold a hearing to determine whether to vacate the *murder conviction* and to recall the sentence" (§ 1170.95, subd. (d)(1), italics added), unless the parties "waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her *murder conviction* vacated" (§ 1170.95, subd. (d)(2), italics added).

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[4] But see *People v. Lee* (2020) 49 Cal.App.5th 254, 263 (provocative act murder defendant is ineligible for resentencing under section 1170.95.)

Relying on the italicized language above, the Second and Fourth District Courts of Appeal have concluded that a person convicted of manslaughter is not entitled to relief under section 1170.95's plain terms. (*People v. Sanchez* (2020) 48 Cal.App.5th 914, 917 (*Sanchez*); *Turner, supra,* 45 Cal.App.5th at p. 432; *People v. Flores* (2020) 44 Cal.App.5th 985, 993 (*Flores*); *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887.) Using similar reasoning, appellate courts have concluded that section 1170.95 does not apply to a person convicted of attempted murder. (E.g., *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1017, review granted Mar. 11, 2020, S259948; *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1104, review granted Nov. 13, 2019, S258175.)

Appellant focuses on section 1170.95, subdivision (a)(2), which provides that one requirement for relief is that "[t]he petitioner was convicted of first degree or second degree murder following a trial or *accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder*." (Italics added.) Since the italicized language does not expressly require a defendant to have accepted a plea offer for murder, he urges it must be interpreted in his favor to apply to those defendants who pleaded to voluntary manslaughter to avoid being tried for murder based on a theory that Senate Bill 1437 abolished. To conclude otherwise would render the italicized language surplusage, since "[t]here would have been no need to draft two clauses, one that specifies convictions of murder after trial, and one that applies to pleas to murder." He also argues that the specific provision regarding pleas in section 1170.95, subdivision (a)(2) controls over the general introductory language of section 1170.95, subdivision (a).

Appellant's contentions are unpersuasive because they "place[] outsized importance on a single clause to the exclusion of the provision's other

language. . . . [T]he remaining portions of section 1170.95 repeatedly and exclusively refer to murder, not manslaughter." (*Flores, supra,* 44 Cal.App.5th at p. 995; see *Turner, supra,* 45 Cal.App.5th at p. 436 [concluding such an interpretation "ignores the introductory language in . . . subdivision (a) that limits petitions to persons 'convicted of . . . *murder*.' "].) In any event, the reference to trials and pleas in section 1170.95, subdivision (a)(2), is not surplusage to the extent it clarifies that petitioners who entered pleas to murder are also eligible for relief. "Express statutory language defining the class of defendants to whom section 1170.95 applies is not surplusage. [Citation.] Such clarification 'may eliminate potential confusion and avoid the need to research extraneous legal sources to understand the statute's full meaning.' " (*Sanchez, supra,* 48 Cal.App.5th at p. 919.)

Even if subdivision (a)(2) of section 1170.95 could have been drafted more concisely, "the rule against surplusage will be applied only if it results in a *reasonable* reading of the legislation." (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 234–235.) As we have indicated, interpreting subdivision (a)(2) to include a person convicted of voluntary manslaughter after a plea conflicts with section 1170.95's other provisions. For this reason, we decline to apply the rule of lenity to interpret subdivision (a)(2) in a manner at odds with the rest of the statute.

Having concluded that section 1170.95 unambiguously applies only to petitioners convicted of murder, we need not examine in any depth appellant's arguments regarding legislative intent. Among other things, he references the preamble to Senate Bill 1437, which declares that "[i]t is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual

culpability." (Stats. 2018, ch. 1015, § 1(d).) Appellant asserts that "limiting the law to murder convictions results in a gross injustice that is repugnant to the express purpose of the law—to punish a person 'for his or her actions according to his or her own level of individual culpability.' " However, as the Fourth District explained in *Turner,* the legislative history of Senate Bill 1437 confirms that the Legislature did intend to limit eligibility for resentencing to persons convicted of murder. (*Turner, supra,* 45 Cal.App.5th at pp. 436–438.) We find *Turner's* analysis on this point persuasive, and appellant offers us no reason to depart from it.

DISPOSTION

The order denying appellant's section 1170.95 petition is affirmed.

Sanchez, J.

WE CONCUR:

Humes, P.J.

Banke, J.

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